No. 17-961

In The Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether, or in what circumstances, a cy pres award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

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INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") is the leading national membership organization of the legal profession. The ABA's membership of over 400,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[1]

The ABA's mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession." Among the ABA's goals is to "[i]ncrease public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world," to "[a]ssure meaningful access to justice for all persons," and to "eliminate bias in the . . . justice system." ABA Mission and Association Goals, available at

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[1] Pursuant to Supreme Court Rule 39(6), the ABA certifies that no counsel for a party authored this brief in whole or in part, and that no party, no party's counsel, and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council before filing.

All parties have consented to the filing of this brief.

http://www.americanbar.org/about_the_aba/aba-mission-goals.html.

In 2016, the ABA House of Delegates adopted a resolution in support of cy pres awards advanced by its Standing Committee on Legal Aid & Indigent Defendants, Commission on Homelessness & Poverty, and Commission on Interest on Lawyers' Trust Accounts. The resolution provided, in full:

> RESOLVED, That the American Bar Association urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty.
>
> FURTHER RESOLVED, That before class action residual funds are awarded to charitable, non- profit or other organizations, all reasonable efforts should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible.

Resolution and Report to the House of Delegates, available at https://www.americanbar.org/content/dam/aba/admin

istrative/legal_aid_indigent_defendants/ATJReports/ls_atj_cypres.authcheckdam.pdf.

The ABA's Standing Committee on Legal Aid and Indigent Defendants also supports the growth and development of state Access to Justice ("ATJ") Commissions, collaborative entities that bring together courts, the bar, civil legal aid providers, and other stakeholders in an effort to remove barriers to civil justice for low-income and disadvantaged people. https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions.html. Beginning with the first ATJ Commission in 1994 (Washington State), such entities have been developing all over the country, engaging in a full range of activities and strategies to accomplish their goals and objectives. *Id.* In multiple states, ATJ Commissions have been instrumental in pressing for statutes and rules that authorize cy pres awards and providing educational information for attorneys and judges regarding cy pres awards.

Further, for decades, the ABA has been at the forefront of assessing the ability of the indigent and those with low or moderate income to use the justice system to obtain assistance with legal problems. *See, e.g.*, ABA Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: A Survey of Americans* (1994). It also collects state-by-state reports that assess the legal needs of low-income people and the economic impact provided by legal services organizations. *See generally* https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj_commission_self-

assessment_materials1/studies.html (collecting studies).

The ABA also is the only organization that tracks cy pres awards nationally. Its data reflects that cy pres awards from federal and state class action settlements provide an average of $15.5 million annually to legal services organizations.

The ABA's expertise regarding cy pres awards and their role in funding legal services organizations is germane to this appeal. This brief *amicus curiae* will demonstrate that legal services organizations are appropriate recipients of cy pres awards in class action settlements, which, if recognized by this Court, will promote access to justice for underserved populations.

SUMMARY OF ARGUMENT

The ABA takes no position on the precise question before this Court – if and under what circumstances can a court approve a settlement that consists solely of a cy pres award with no direct relief to class members based on a finding that such payments are not feasible. Consistent with that limited scope, the ABA will not argue the specifics of whether the district court's decision should be affirmed, reversed, or remanded. However, as an *amicus curiae*, the ABA seeks to provide information to this Court about the role of cy pres awards in class actions, their importance in funding legal services to low-income and indigent litigants, and the potential impact on state statutes and rules providing for cy pres awards. These are important considerations for this Court as it considers for the first time the

specific standards that lower courts should apply in considering if and under what circumstances they should authorize cy pres awards in class action settlements.

The cy pres doctrine, originally a creation of trust law, has increasingly been used as a basis to distribute residual funds from class action settlements to nonprofit organizations or other third-party beneficiaries with interests reasonably approximate to those of the class members. This equitable doctrine ensures that neither the defendant nor class members receive windfalls when settlement funds go unclaimed or distribution to class members proves infeasible.

Cy pres is most commonly used in class actions brought under Federal Rule of Civil Procedure 23(b)(3), which permits aggregate claims for monetary damages. Such claims often involve small individual recoveries, which may deter individual litigants from pursuing claims and counsel from taking on representations. Rule 23(b)(3), thus, serves the purpose of improving the ability of class members to obtain justice by aggregating their claims and deterring wrongful conduct.

A similar purpose is served by the legal services organizations that are often appropriate recipients of cy pres awards. These organizations provide legal services to low-income and indigent litigants who otherwise would have no representation in civil courts. This unity of purpose justifies cy pres awards to legal services organizations, as both courts and state legislatures have recognized. The ABA urges this Court to do the same.

Finally, the ABA asks this Court to limit any decision about cy pres awards to the question presented and to avoid broad pronouncements about the constitutionality of cy pres remedies in class action settlements. Such a ruling would not only impact federal class actions, but would potentially disrupt state statutory schemes that provide for cy pres awards to legal services organizations.

ARGUMENT

I. Cy Pres Serves Important Purposes in Class Action Settlements.

Cy pres serves important purposes in class action settlements, particularly in cases involving small claims. The cy pres doctrine takes its name from the Norman French term "*cy pres comme* possible," meaning "as near as possible." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (internal quotation marks and citation omitted). Originally used as an equitable means of distributing trust fund assets when the trust's original purpose could not be achieved, the principles of cy pres have been applied to modern class action settlements. *Id.*; Martin H. Redish, *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 653-56 (2010) (hereinafter "Redish").

Soon after the 1966 amendments to Rule 23 and the ensuing expansion of class actions, a student comment proposed that the equitable cy pres principle in trust law could be employed when class action settlements and awards could not be

distributed fully to the class members. Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 448 (1972); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (discussing development of cy pres awards in class actions). Significant growth of cy pres awards followed from approximately once per year between 1974 and 2000 to approximately eight per year between 2001 and 2008. Redish, 62 FLA. L. REV. at 653.

The cy pres doctrine is particularly appropriate in class actions aggregating small claims. American Law Institute's Principles of Law of Aggregate Litigation (2010), § 3.07, cmt. b ("ALI Principles"). Because class members with only small amounts at stake seldom bother to claim their shares of a settlement fund, residual funds may remain after an initial effort to distribute it to the class. Courts then face a dilemma over the distribution of the residual funds. Distributing the residual to class members that have already received full compensation would provide a windfall to those members. Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 393 (1999) (citing *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815 (2d Cir. 1977)). Returning unclaimed settlement funds would be equally inequitable. *Id.*; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (by authorizing cy pres awards, courts prevent defendants "from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement [or] judgment").

Cy pres "serves deterrence better than returning funds to the defendant; it avoids windfalls to class members, and it directs left-over funds in a way that creates some benefit to the class." Robert G. Bone, *Justifying Class Action Limits: Parsing the Debate over Ascertainability and Cy Pres*, 65 U. KAN. L. REV. 913, 943-44 (2017).

Cy pres awards in class action settlements were envisioned to "'put[] the unclaimed fund to its *next best* compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (alteration in original) (quoting 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 10:17 (4th ed. 2002)); *accord Nachsin*, 663 F.3d at 1038. Under rules proposed by the American Law Institute's Principles of Law of Aggregate Litigation(, when feasible, undistributed residual funds should be distributed to recipients "whose interests *reasonably approximate* those being pursued by the class. . . ." ALI Principles, § 3.07 cmt. a (emphasis added). This "reasonable approximation" test has been adopted by numerous courts in determining the fairness of class action cy pres awards. *See, e.g., Oetting v. Green Jacobson, P.C. (In re BankAmerica Corp. Sec. Litig.)*, 775 F.3d 1060, 1067 (8th Cir. 2015); *In re Lupron Mktg. & Sales Practice Litig.*, 677 F.3d 21, 33 (1st Cir. 2012); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990).

II. Legal Services Organizations That Serve Low-Income and Indigent Litigants Are Proper Recipients of Cy Pres Awards Because They Share the Same Purpose as Rule 23(b)(3) Class Actions.

A fundamental purpose of class actions is to offer access to justice for people who, on their own, could not otherwise realistically obtain the protections of the justice system. Legal services organizations that represent poor and indigent litigants serve the same fundamental purpose – to provide access to the judicial system to people who otherwise might be unable to litigate. With these closely aligned purposes, legal services organizations should in most cases be appropriate recipients of cy pres awards.

1. Class actions often provide access to courts for civil litigants that otherwise might forego judicial relief. In most class actions seeking monetary relief, certification requires a court to find that a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

As part of this superiority analysis, courts have long recognized that claims that would result in small individual recoveries are particularly amenable to class action treatment. As this Court has explained, "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Prods. v. Windsor*, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246 (1997) (quoting Kaplan, Prefatory Note, 10 B.C.

IND. & COM. L. REV. 497, 497 (1969)). "'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Id.* (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). "'A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" *Id.*; *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 515 (9th Cir. 2013) ("In light of the small size of the putative class members' potential individual monetary recovery, class certification may be the only feasible means for them to adjudicate their claims" and thus "is also the superior method of adjudication.").

Thus, a fundamental role of the class action device is to provide a means of access for litigants who might otherwise be unable to bring claims. As Judge Posner explained, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); *see also* Bob Glaves & Meredith McBurney, *Cy Pres Awards, Legal Aid and Access to Justice: Key Issues in 2013 and Beyond*, 27 MGMT. INFO. EXCH. J., 24, 25 (2013) ("[N]o matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system."); Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards*: Emerging Problems and Practical Solutions, 21 VA. J. SOC.

POL'Y & L. 267, 291 (2014) (hereinafter "Boies") ("One interest of every class member in any class action in any area of the law is access to justice for a group of litigants who, on their own, would not realistically be able to seek court relief").

2. Legal services organizations serve a similar purpose as Rule 23(b)(3): They provide representation to litigants that otherwise might be unable to protect their interests in civil actions.

These organizations provide a vital service. More than 60 million Americans live below the poverty level. Legal Services Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (2017), at 16 ("*Justice Gap*"), available at https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf. In the Legal Services Corporation's ("LSC") 2017 Justice Gap survey, 71% of survey respondents reported having at least one civil legal problem in the prior year, 54% faced at least two such problems, and nearly a quarter had experienced six or more civil legal problems. *Id.* at 21. These problems often related to basic issues of health, finances, rental housing, children and custody, education, income maintenance, and disability. *Id.* at 21-23. Seventy percent of low-income Americans who personally experienced a civil legal problem in the past year, reported that at least one of the problems has affected them "very much" or "severely." *Id.* at 25. Respondents reported to the LSC survey that they sought the help of a legal professional for only 20% of all of the civil legal problems they face, and for only 24% of the problems that affect them "very much" or "severely." *Id.* at 29.

LSC alone provides funding to organizations and programs that helped approximately 1.8 million people in 2016. LSC, *By the Numbers: The Data Underlying Legal Aid Programs*, at 63 (2016) (hereinafter "*By the Numbers*"). However, demand for legal aid far outstrips the resources available. In the most recent *Justice Gap* survey, LSC-funded organizations could not assist on approximately 41% of the eligible problems low-income Americans presented to these organizations. *Justice Gap*, at 43. Most of those problems were rejected due to limited resources. *Id.*

The federal government also recognizes that civil legal services organizations provide vital support for federal efforts to serve the low-income and other vulnerable populations. For example, the White House Legal Aid Interagency Roundtable ("WH-LAIR") cites the role that legal services organizations play in supporting veterans, including preventing avoidable evictions and foreclosures, negotiating fair child support orders, resolving credit report problems, and assisting veterans secure government benefits. Dep't of Justice, WH-LAIR Case Study: Help Veterans and Servicemembers, available at https://www.justice.gov/lair/file/826546/download.[2]

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[2] Other case studies reflect the Department of Justice's view that civil legal services organizations support federal efforts in numerous areas, including, inter alia, protecting consumers, keeping children in school, preventing domestic violence, helping people exit homelessness and stay housed, and assisting Americans with disabilities. *See generally* WH-LAIR Case Studies, available at https://www.justice.gov/lair/wh-lair-case-studies.

3. Because of this unity of interest between the purpose of the class action mechanism and legal services organizations, legal services organizations should always be appropriate recipients of residual class action settlement funds. Legal services organizations that provide access to the courts satisfy the reasonable approximation test for cy pres awards. Boies, 21 VA. J. SOC. POL'Y & L. at 290-91 ("The access to justice nexus falls squarely within ALI Principles' guidance that 'there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.'").

Consistent with that reasoning, courts authorizing cy pres awards consistently find legal services organizations to be appropriate recipients of class action residual funds. Cecily C. Shiel, *A New Generation of Class Action Cy Pres Remedies: Lessons from Washington State*, 90 WASH. L. REV. 943, 955-56 (2015) (discussing cases providing for distribution of residual funds to legal services organizations); Daniel Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 GEO. J. LEGAL ETHICS 435, 438 (2012) ("there are many cases in which judges grant cy pres distributions to legal aid foundations and bar associations"); Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 LA. B.J. 248, 251 (2011) (citing cy pres awards to local legal services organizations and the Louisiana Bar Foundation); Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 TENN. BAR J. 12, 13-14 (2009) (identifying federal cases that have "awarded unclaimed class action settlement funds to

legal aid programs because, like class action lawsuits, the programs provide a means to legal representation").

Indeed, recognizing this connection, many states have enacted statutes or rules expressly directing that residual funds from class action settlements be distributed to nonprofit and state Bar-affiliated organizations that provide civil legal services for low-income residents. *See*, section III, *infra*.

This Court should similarly recognize that legal services organizations are proper recipients of cy pres awards in class action settlements.

4. To rule otherwise would risk depriving legal services organizations of an important source of funding. The ABA tracks cy pres awards nationally and has determined that, an average of $15.5 million in cy pres awards at the state and federal level are provided to legal services organizations each year. These funds are critical to their operations, as direct government funding for these organizations has decreased. *See, e.g.*, LSC, *By the Numbers*, at 11-12 (reflecting decline in funding between 2010 and 2016 in inflation-adjusted dollars from $457 million to $385 million).[3]

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[3] In 2018, funding increased by $25 million to $410 million, which is still significantly less than the 2010 data. Press Release, LSC Receives $25 Million Spending Boost from Congress (Mar. 23, 2018), *available at* https://www.lsc.gov/media-center/press-releases/2018/lsc-receives-25-million-spending-boost-congress. The President's proposed budget sought to eliminate spending for the LSC altogether. Press Release, Legal Services Corporation Leaders Confident of Bipartisan Support in Wake of Defunding Proposal.

III. States Laws and Rules Providing for Cy Pres Awards in Class Action Proceedings Could Be Imperiled by a Ruling Imposing Constitutional or Other Strict Limitations on Cy Pres Awards.

Petitioners briefly mention due process and First Amendment concerns about cy pres awards, but do not directly raise constitutional challenges to the use of cy pres in class action settlements. However, *amici* at the petition stage and courts have argued that the use of cy pres awards may fail constitutional scrutiny. *See, e.g.*, Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioners, filed Feb. 7, 2018, at 11-19 (arguing the award in this action violates due process); *id.* at 20-24 (arguing that cy pres award compels class members to support speech with which they do not agree in violation of the First Amendment); Brief of *Amicus Curiae* Center for Constitutional Jurisprudence in Support of Petitioners, filed Feb. 7, 2018, at 7-10 (arguing that cy pres awards violate due process, free speech, and Article III); *Keepseagle v. Perdue*, 856 F.3d 1039, 1071 (D.C. Cir. 2017) (arguing that cy pres awards may raise Article III concerns) (Brown, J., dissenting). Should *amici* invite this Court to consider the constitutional implications of cy pres awards, the ABA urges this Court to decline the invitation.

(Feb. 12, 2018), *available at* https://www.lsc.gov/media-center/press-releases/2018/legal-services-corporation-leaders-confident-bipartisan-support.

A decision implicating the constitutionality of cy pres awards would affect not just the distribution of class action settlement funds in federal courts, but would also undermine state laws directing cy pres funds to legal services organizations.

Twenty-three states and Puerto Rico have enacted laws or rules authorizing cy pres awards from class action settlements to be distributed to legal services organizations that provide services to low-income residents. ABA Resource Center for Access to Justice Initiatives, Legislation and Court Rules Providing for Legal Aid to Receive Class Action Residuals, *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_sclaid_atj_cypres.authcheckdam.pdf. For instance, by statute, California mandates that 25% of class action residuals should be provided to the Equal Access Fund of the Judicial Branch for distribution to legal aid programs, 25% to the Trial Court Improvement and Modernization Fund, and the remaining 50% to organizations that may include "nonprofit organizations providing civil legal services to the indigent." CAL. CODE CIV. P. § 384. See also 735 ILCS 5/2-807 (providing that at least 50% of residual funds must go to organizations eligible for funding under the Illinois Equal Justice Act); NEB. REV. STAT. 25-319(2) (requiring distribution of residual funds to the Nebraska Legal Aid and Services Fund); N.C. GEN. STAT. § 1-267.10(b) (requiring "the unpaid residue, to be divided and credited equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents"); P.R. LAWS ANN. tit. 32A.

§ 20.6(b) (authorizing distribution of residual funds to programs that provide legal representation to persons of limited means in civil, administrative, and family law proceedings); S.D. CODIFIED LAWS § 16-2-57; (requiring at least 50% of residual funds go to the South Dakota Commission on Equal Access to Our Courts); TENN. CODE ANN. § 16-3-821 (authorizing distribution of residual funds to the Tennessee Voluntary Fund for Indigent Civil Representation); WISC. STAT. 803.08(10) (requiring that "not less than 50 percent of the residual funds shall be disbursed to [Wisconsin Trust Account Foundation, Inc.] to support direct delivery of legal services to persons of limited means in non-criminal matters").

Other states have similar requirements by rule. *See* COL. R. CIV. P. 23(g) ("not less than fifty percent (50%) of the residual funds shall be disbursed to the Colorado Lawyer Trust Account Foundation (COLTAF) to support activities and programs that promote access to the civil justice system for low income residents of Colorado"); CONN. SUP. CT. R. 9-9(g)(2) ("residual funds [from class judgment or settlement] shall be disbursed to the organization administering the program for the use of interest on lawyers' client funds . . . for the purpose of funding those organizations that provide legal services for the poor in Connecticut"); HAW. CIV. P. R. 23(f) (court has discretion to disburse residual funds to eligible nonprofit tax exempt organizations that provide legal services to the indigent); IND. R. TRIAL P. 23(F)(2) (at least 25% of residual funds must be disbursed to the Indiana Bar Foundation); KY. CIV. R. 23.05(6) (providing that at least 25% of residual funds be distributed to legal aid organizations through the

Kentucky IOLTA Fund Board of Trustees); LA S. C. RULE XLIII Part Q (authorizing residual funds to be distributed to the Louisiana Bar Foundation); ME. R. CIV. P. 23(f)(2) (mandating that residual funds be distributed to the Maine Bar Foundation); MASS. R. CIV. P. 23(e) (permitting distribution of residual funds "to support activities and programs that promote access to the civil justice system for low income residents"); N.M. DIST. CT. R. C.P. 1-023(G)(2) (authorizing distribution of residual funds to "nonprofit organizations that provide civil legal service to low income persons"); OR. R. CIV. P. 32(O)(1) (requiring at least 50% of residual funds to be paid to the Oregon State Bar to fund legal services to the poor); Pa. R. Civ. P. Ch. 1700 (requiring at least 50% of residual funds to be paid to the Pennsylvania IOLTA Board to promote the delivery of civil legal assistance); S.C. R. CIV. P. 23(e) (requiring at least 50% of residual funds to be paid to the South Carolina Bar Foundation "to support activities and programs that promote access to the civil justice system for low income residents"); WASH. CIV. R. 23(f) (requiring distribution of at least 50% of residual funds to the Legal Foundation of Washington); W. VA. R. CIV. P. 23(f) (directing that 50% of residual funds be disbursed to Legal Aid of West Virginia).

That so many states expressly mandate a specific percentage of the residual funds be directed to providing legal services to low income residents only highlights the identity of interests between legal services organizations and class members, as well as the states' considered judgment that residual funds be used to promote access to justice. This Court

should consider that persuasive evidence of both the unity of interest between cy pres awards and access to justice, as well as the appropriateness of legal services organizations as cy pres recipients.

Because the parties agree that the issue before this Court is simply the proper course a court should undertake in the event of residual funds exist after a class action settlement, the case provides a poor vehicle for the determination of the constitutionality of cy pres more generally. On that issue, this Court lacks the considered views of the lower courts. Moreover, if this Court reaches beyond the limited scope of the question presented and imposes constitutional restrictions on cy pres awards, it will imperil these state laws and potentially deprive legal services organizations of critical funding and low-income residents of legal representation. The American Bar Association urges the Court to consider the impact of its holding on the availability of legal services for low-income persons.

CONCLUSION

For the foregoing reasons, amicus American Bar Association requests that this Court recognize the availability of cy pres awards in class action settlements and legal services organizations as appropriate recipients of residual funds.

Respectfully submitted.

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